

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3 WESTERN SECTION

4 George Perrot)
5) 18cv10147-DPW
6 vs)
7) December 6, 2018
8 Thomas Kelly, et al)
9 _____)

10 Motion Hearing Held Before
11 The Honorable Douglas P. Woodlock
12 United States District Judge
13
14
15

16 APPEARANCES: See the following page
17
18
19

20 Alice Moran, CSR, RPR, RMR
21 Official Federal Court Reporter
22 United States Courthouse
23 300 State Street, Room 303D
24 Springfield, MA 01105
25 (413)731-0086
alice.moran@verizon.net

1 APPEARANCES:

2

3 **On behalf of the plaintiff:**

4 Tara Elizabeth Thompson, 311 N. Aberdeen Street, 3rd
5 Floor, Chicago, IL 60607.

6

7 **On behalf of the defendants:**

8 Lisa C. DeSousa, 1600 East Columbus Ave., Springfield, MA
9 01103.

10 Glenn S. Greene, P.O. Box 7146, Ben Franklin Station,
11 Washington, DC 20044.

12 Kathleen E. Sheehan, 293 Bridge Street, Suite 600,
13 Springfield, MA 01103.

14 Carole Sakowski Lynch, Towersquare Building, Suite 2400,
15 1500 Main Street, PO Box 15387, Springfield, MA
16 01115-5387.

17 Austin M. Joyce, 4 Lancaster Terrace, Worcester, MA 01609.

18 Jeremy Saint Laurent, 36 Court Street, Springfield, MA
19 01103.

20 Susan G. Reardon, One Ashburton Place, 18th Floor, Boston,
21 MA 02108.

22

23

24

25

1 THE CLERK: This honorable court is now in
2 session. Please be seated.

3 Civil Action No. 18-10147, Perrot versus Kelly. If
4 counsel can be please identify yourselves prior to
5 addressing the court.

6 THE COURT: So let's see if I can do a little
7 bit of housekeeping and get this in place.

8 I guess the place I would like to start is transfer
9 of venue. I'm not sure why it's made with the motion to
10 dismiss practice initially.

11 We were kind of surprised that we got a call saying
12 that counsel for the City wanted to participate by phone.
13 Is it pretty hard to get up State Street?

14 MS. DeSOUSA: I'm sorry, that was a misstatement
15 in my office. We thought we were in Boston today so I
16 apologize for that.

17 THE COURT: You did?

18 MS. DeSOUSA: It got diaried incorrectly in my
19 office and it looked like we were in Boston today so I
20 apologize for that.

21 THE COURT: Well, I take it that this should be
22 sharpened a bit because it does suggest a lack of
23 attention to the case. But if I were treating this as a
24 motion for transfer which was made when the Rule 12 motion
25 was made, it was not filed then. It took three months to

1 think about it. So why?

2 MS. DeSOUSA: Frankly, Your Honor, we assumed
3 erroneously that counsel for the plaintiff would be
4 willing to conduct the pretrial discovery in Springfield
5 since the vast majority of the deponents, as well as the
6 vast majority of counsel --

7 THE COURT: We have rules for that. If there's
8 depositions to be taken in the Western division, they
9 could be done in Springfield. I don't understand this.

10 MS. DeSOUSA: Frankly, Your Honor, neither did
11 we.

12 THE COURT: Did you make a motion?

13 MS. DeSOUSA: We did not. We made --

14 THE COURT: Okay. So what you did was you
15 waited three months to move to transfer the case after you
16 seen who the judge is?

17 MS. DeSOUSA: No.

18 THE COURT: No. No. Just a moment. That's
19 what happened. That's the timing. People can draw
20 whatever conclusions they want to draw about it, but in a
21 dilatory fashion the City of Springfield -- which has a
22 tickler system that makes them think they're in Boston
23 when they're in Springfield -- makes this motion saying
24 that it's because there's a problem about discovery in
25 Springfield and never makes a motion about adjusting that,

1 which is easily done. It probably can be done less than
2 three months such a motion.

3 So the problem I have is this: I was assigned this
4 case. Springfield is a courthouse with a single-district
5 judge. It implicates some important matters in the
6 Western division of the state. It also involves district
7 attorneys' offices and so there's a potential for a series
8 of recusal motions here.

9 My own view is that if the case gets tried, it's
10 tried out here. I'll try it out here. If there's some
11 problem about adjusting discovery, I can work that out
12 too. But I just don't see (A) why you waited so long and
13 (B) -- maybe we're beyond that, although that will be
14 sufficient grounds to deny it -- (B), what the problem is
15 about discovery because nobody really has made that clear
16 to me.

17 MS. DeSOUSA: Again, Your Honor, there were
18 numerous emails between our office and counsel for --

19 THE COURT: What emails?

20 MS. DeSOUSA: I'm sorry?

21 THE COURT: What emails?

22 MS. DeSOUSA: I did not attach them in my --

23 THE COURT: So I'm supposed to rule on something
24 that I don't have evidence for?

25 MS. DeSOUSA: I can represent as an officer of

1 the court within the motion to change venue that they were
2 unwilling to schedule depositions in Springfield.

3 THE COURT: Okay. So the deponents are all
4 living in Springfield, is that right?

5 MS. DeSOUSA: All of the deponents that have
6 been marked up to date that I represent or that are
7 current or former employees of the City of Springfield.

8 THE COURT: So what's the problem?

9 MS. THOMPSON: Judge, we never said we wouldn't
10 do depositions in Springfield.

11 THE COURT: Okay. Now that tells me all I need
12 to know, which is that you are going to be very careful in
13 the future about raising matters like this. This is
14 sandbox stuff and it is beneath the dignity of members of
15 the bar.

16 The short of it is discovery should take place in
17 Springfield if people are in Springfield. If not, then
18 wherever they are. If somebody is in Florida --
19 apparently there are some people who are in the next life
20 that the plaintiffs continue to pursue, but I'm not
21 transferring the venue now for this belatedly.

22 If this case has evidentiary hearings that require my
23 attention, I'll do it out here. I've done it before. I
24 think that's my responsibility here.

25 I suspect that after a certain amount of time that

1 the City of Springfield might well even consider whether
2 or not it wants to have the case tried outside of this
3 division for purposes of jury taint, but that's to be
4 dealt with at a later point.

5 MS. DeSOUSA: Thank you, Your Honor.

6 THE COURT: Okay. So that motion, which is
7 number 96, is denied.

8 Now, did I get all this? There really has been no
9 discovery?

10 MS. THOMPSON: We've conducted depositions in
11 Springfield up to this point, Your Honor. We've done two.
12 We have another one scheduled for the 17th and we have
13 been trying to work out dates for defendant Bloom who we
14 hope to do in December but who I think was not available
15 given counsels' schedule until January. We've served
16 written discovery requests. We received back
17 interrogatories and some documents so discovery is
18 proceeding, Your Honor.

19 THE COURT: Okay. So when is it that you think
20 you're going to have an amended complaint?

21 MS. THOMPSON: We have a couple of additional
22 Springfield defendants that we want to depose still before
23 we're able to do that, but we hope to get them done in --
24 one we have scheduled in December and in the early weeks
25 of January. If we can have until the end of January, we

1 would be prepared to amend then, Your Honor.

2 THE COURT: So the motion for extension of time
3 to file the first amended complaint to November 5th has
4 been overtaken by time, is that it?

5 MS. THOMPSON: It has, Your Honor. We would
6 agree --

7 THE COURT: Is that real, that time that you're
8 talking about? Is that real for this because I'm going to
9 treat the complaint with real rigger? The blunderbuss
10 approach to pleading is not going to last forever. So are
11 you going to be able in a date that I will establish in
12 January?

13 MS. THOMPSON: I believe that we are, Your
14 Honor. I understand the court is telling us this is a
15 real deadline and the court expects to see an amended
16 pleading. We want to do the same. I believe defendants'
17 counsel have been cooperative with us in scheduling.
18 There's been some difficulties. If we can get these
19 depositories done, we will be in a position to amend.

20 THE COURT: Apparently they thought that those
21 depositions weren't going to take place in Springfield
22 just like they thought this hearing wasn't going to take
23 place in Springfield. So that's a misunderstanding?

24 MS. THOMPSON: I've been to depositions in
25 Springfield for this case and defendant Bloom's counsel

1 asked to be deposed in Boston because that's where he
2 resides. We will honor that, but we're not dragging
3 people to Boston that live in Springfield. That's not
4 ever been our position.

5 THE COURT: What date in January? Bear in mind
6 that this has to include a Federal Tort Claims Act.

7 MS. THOMPSON: Understood, sir. If we can have
8 until the end of January to finish the necessary
9 discovery, we'll file our amended complaint by February
10 1st if that's acceptable.

11 THE COURT: Okay. February 1st, and I expect
12 that counsel will be reluctantly here and knowledgeable of
13 where they're supposed to be.

14 Now turning to the complaint itself, I want to make
15 sure that I haven't missed something because there's been
16 a tsunami of paperwork that's been submitted in connection
17 with this.

18 I want to turn in particular to the claim itself with
19 the section that deals with claim of exoneration. There's
20 a reference to finality of October 2017. This is
21 paragraph 125.

22 MS. THOMPSON: Yes, Your Honor.

23 THE COURT: And some sort of it appears to be a
24 writing I assume of Judge King. I haven't been able to
25 find it anywhere. Is it anywhere in the papers? I have

1 the *nolle pross*.

2 MS. THOMPSON: It was an opinion granting him a
3 new trial and I do not have a copy with me.

4 THE COURT: That's January 26, 2016. It's
5 reported in West law. Now there's a reference here to
6 "plaintiff was granted post-conviction relief, final
7 October 11th. The court held that the admission of flawed
8 evidence cast real doubt on the justice of plaintiff's
9 conviction." I assume that that's something on October
10 11th, is it or not?

11 MS. THOMPSON: I confess I do not know
12 specifically where that quote comes from.

13 THE COURT: So what I think I'm going to ask is
14 that you provide it to me within say four days.

15 MS. THOMPSON: I will, Your Honor.

16 THE COURT: And that my only view is that if
17 you're going to be relying on these kinds of documents
18 which become part of the complaint anyway, that they be
19 attached to the amended complaint --

20 MS. THOMPSON: Yes, Your Honor.

21 THE COURT: -- that you file.

22 Now, this question of the plaintiff -- let me step
23 back a bit.

24 What do you think you're going to get from these dead
25 people?

1 MS. THOMPSON: We believe under the statute that
2 the City has a duty to indemnify them. I mean obviously
3 now we're talking about them but we are talking about the
4 one person that we're seeking to appoint.

5 THE COURT: I thought there were two now.

6 MS. THOMPSON: It's only Mr. Kelly, Your Honor,
7 and that's --

8 THE COURT: You made an amended effort to have
9 me appoint a person to represent him?

10 MS. THOMPSON: For Mr. Kelly.

11 THE COURT: Right. Wasn't there another?

12 MS. THOMPSON: We did also learn that there was
13 an additional person that was deceased, Your Honor, but
14 he's not --

15 THE COURT: You don't want me to appoint a
16 person to represent that additional person?

17 MS. THOMPSON: We are only seeking an
18 appointment related to Mr. Kelly.

19 THE COURT: So the additional person is not
20 going to be a party in this case?

21 MS. THOMPSON: That's right, Your Honor.

22 THE COURT: All right. So back to what you
23 think you're going to get from the dead person?

24 MS. THOMPSON: The statute requires
25 indemnification and we --

1 THE COURT: Perhaps. In any event, so you get a
2 judgment and the judgment can be assessed against the City
3 of Springfield; is that what you're suggesting?

4 MS. THOMPSON: Well, the judgment could be
5 assessed against the estate.

6 THE COURT: Correct. The estate -- a
7 representative of the estate is going to go after the City
8 of Springfield to get the money to put back into the
9 estate to provide funds for whatever judgment you get; is
10 that it?

11 MS. THOMPSON: Our client would be a
12 beneficiary; we can also seek that as well.

13 THE COURT: Pardon me?

14 MS. THOMPSON: Our client would be a beneficiary
15 as well.

16 THE COURT: I understand that's the theory. So
17 the theory is that you will get a judgment. The judgment
18 should result in indemnification from the City and that
19 indemnification from the City becomes part of the estate
20 which is reopened and then your client can make a claim on
21 that reopened estate?

22 MS. THOMPSON: Yes, Your Honor.

23 THE COURT: Okay. Where is the estate closed?

24 MS. THOMPSON: It was in Massachusetts, Your
25 Honor. It was in Hampden County Probate Court, Your

1 Honor.

2 THE COURT: Okay. So why don't you go into the
3 Hampden County Probate Court?

4 MS. THOMPSON: It is a complicated process to do
5 this in the state court and it is true --

6 THE COURT: It's an unknown process in the
7 federal court except in the Seventh Circuit in which the
8 court thought it was useful to appoint somebody to
9 participate as plaintiff to move forward but this is core
10 probate stuff.

11 I have a question of whether I even have jurisdiction
12 to do something like that, putting aside what the Seventh
13 Circuit finds convenient. This much I know in that 30
14 years on the bench I haven't done it. This is core
15 probate and family court work.

16 I've had it done where lawyers go into the state
17 court because, as you say, it is a complex process and
18 it's made more complex by a variety different dimensions
19 to it, not the least of which is this question of
20 indemnification, and a probate court judge may well take a
21 position that it's not worth pursuing indemnification or
22 not. I don't know, but that is very much core state
23 activity. And if it weren't a matter of jurisdiction for
24 me, I think that I would be abstaining in this hearing.

25 I realize there's been some erosion of the probate

1 exception. The Perez case, the Marshal case, but for a
2 federal judge to administer an estate and reopen it
3 through the appointment of someone in a county in which
4 that judge has some familiarity -- not that I would do it
5 for Essex county or Suffix -- it seems to be foolish in an
6 effort at trying to pursue a questionable initiative like
7 this.

8 If you want it, you go into the probate court in
9 Hampden County. I'm not going to do it and you're going
10 to have to do it in 90 days --

11 MS. THOMPSON: Understood, Your Honor.

12 THE COURT: -- if you want to proceed with this.

13 So I am denying the motion to number 79 for the
14 corrected motion to appoint a special representative as to
15 Kelly.

16 I'm denying the motion for leave to file a second
17 corrected motion to appoint a special representative for
18 Kelly, that's 81.

19 I take the representation that there are no more dead
20 people going to be parties in this case?

21 MS. THOMPSON: I believe we have confirmed that
22 now, Your Honor.

23 THE COURT: Okay. So then we turn to this
24 question of striking the summons and the execution of the
25 summons. I'm not so certain that the City defendants are

1 in a position to make such a motion. I'm in a position to
2 look at it. I find it to be ineffective service here and
3 if I'm not mistaken we're only talking about Kelly, right?

4 MS. THOMPSON: That's right. That's right, Your
5 Honor.

6 THE COURT: So the special representative that
7 you'll get in the Hampden Probate Court will be making
8 whatever arrangements.

9 MS. THOMPSON: We would then seek, Your Honor,
10 an extension of time to effect service until such time as
11 we have an opportunity to seek to reopen.

12 THE COURT: Well, such time kind of spins -- I
13 said 90 days that you have to get a special
14 representative; that representative you'll get in 90 days
15 so you've got 90 days to perfect service.

16 MS. THOMPSON: Okay.

17 THE COURT: So I'm denying the motion number 61
18 to strike since they don't -- the party who made the
19 motion has any standing to do so, but it does call to my
20 attention something that's apparent in the record which is
21 there is a failure to provide to a return of service and
22 focusing only on the defendant, the late-defendant Kelly.
23 As to him I will extend the period of time 90 days to
24 effect proper service which I understand will be through a
25 personal representative. That seems to be about the only

1 way that you will be able to get service here. If there's
2 another way, I'm sure you will bring it to my attention.
3 The way that was chosen was not an appropriate way.

4 So then I come back to -- or I should say I come to
5 the motion of the two federal defendants here and that
6 raises some daunting questions I suppose under Bivens
7 particularly given Justice Kennedy's final statements with
8 respect to that. I guess I've waited until and unless I
9 have to, but I have some questions about the nature of the
10 pleadings as they exist now.

11 Just a moment now --

12 MR. GREENE: Sure.

13 THE COURT: -- a comment from counsel on this.
14 About the nature of the pleadings which seem to be quite
15 conclusory, not casual and to the degree that there's a
16 suggestion that they're factual, I want to be sure that
17 everyone is aware of the vitality of Rule 11 when making
18 claims of essentially obstruction of justice which are
19 serious claims. But I look at this now and it seems to
20 be, presently as pled, it seems to me to be conclusory in
21 nature, so conclusory is making it difficult to determine
22 whether or not it's plausible.

23 I guess there are a couple of ways dealing with it
24 which is to say wait until the long-awaited first amended
25 complaint is received or go through this step by step, the

1 first step being I guess paragraph 65 and thereafter of
2 the complaint.

3 Any way of looking at the terms and understanding
4 more broadly the terms, whether they're appropriately
5 determinative on a motion to dismiss is not a matter, but
6 is that there was a late awareness of the shortcomings of
7 the science of this kind of expertise. It's recited at a
8 point in Judge Cain's decision of January 26, 2016. He
9 seems to have gone through this quite carefully.

10 As it happened in the Obama administration there was
11 an extensive evaluation of forensic evidence, scientific
12 evidence that parallels this, but for the received wisdom
13 -- let's say I received it from Judge Cain in his opinion
14 is what people thought was science or at least forensic
15 science, meaning as Warren Black once put it, a government
16 architecture is to architecture, military music is to
17 music and forensic science is to science; military music
18 is to music, which is something less than completely
19 vigorous has now been focused a bit since the time period
20 on which this took place and we had two people, Eubanks
21 and Oaks, working in a vineyard that's turned out not to
22 be very productive. But to say that they did things
23 falsely, falsely reported is a little bit more than I
24 think I can take on just the pleadings like this. So I
25 guess I don't understand what evidence there is to support

1 the allegations that are made here.

2 At one level I guess I can say false reports means
3 that this was not rigorous enough science to meet current
4 standards, even the current standards that the jurists
5 itself is using as they did apparently go back into this
6 once it was brought to their attention or at least having
7 been brought to their attention and back into it, not
8 treating this kind of evidence the same way it did before,
9 nor are courts. But if falsely reported simply means that
10 this was someone who believes that the universe revolved
11 around the earth until Galileo suggested otherwise, then
12 I'm not sure that that falls in the category of false
13 reporting at least as I understand it.

14 So I guess I have a two-step process. Number one, is
15 your false tort claims -- Federal Tort Claims Act case
16 going to address negligence on the part of the bureau
17 employees? Is that going to be raised there, or are you
18 simply either have it in front of this set of allegations
19 here against the individuals personally or not at all?

20 MS. THOMPSON: I will confess that I don't know
21 the answer to the court's question because it's something
22 that we have to consider, but I agree with the court that
23 as to these claims this is not about something that they
24 -- you know, we said this in our response to the motion to
25 dismiss that someone can't be liable for something that

1 they don't do -- they can certainly do unintentionally.

2 So this isn't about as we have explained in our
3 pleading, although perhaps inartfully, this is not about
4 new science superceded what Oaks and Eubanks had to say.
5 This is a case where the Springfield defendants talked
6 with Oaks, tell him what they are intending to do, meet
7 with him before the comparison is done, and even as the
8 state court found defendant Oaks in particular slipped
9 from being -- the court's word -- slipped from being a
10 partisan in the case based on that conversation and it is
11 our contention --

12 THE COURT: It happens all the time. I mean,
13 you have to have fallen off the turnip truck not to
14 understand the way in which there are interrelationships
15 between experts and those that they are providing
16 expertise from that leads to a kind of combination bias in
17 all that they do. That's the subject frequently of
18 cross-examination.

19 If somebody goes in the tank, if somebody says I
20 don't care what the evidence is I'm going to say something
21 else or that is I know wrong, then maybe we've got a
22 problem, a problem that can survive qualified immunity.
23 To be sure, you have nothing -- and you will tell me
24 otherwise -- you really have nothing testimonial that can
25 survive absolute immunity, do you?

1 MS. THOMPSON: We are not making any allegations
2 about testimony.

3 THE COURT: So nothing testimonial. So now we
4 are talking about back and forth between experts, the two
5 experts themselves and the prosecution team. I'll put it
6 that way, the state prosecution team, and there you're
7 saying they just got too close or are you saying they went
8 in the bag?

9 MS. THOMPSON: We're saying they went in the
10 bag.

11 THE COURT: How did they do that? Maybe the way
12 to explore this a bit is to say that to look at paragraph
13 70 of your complaint. It says, "On information and
14 belief, defendant Oakes had discussed with other hair
15 microscopists, including unknown agents, the best way to
16 conceal the incriminating evidence." What's the basis for
17 that?

18 MS. THOMPSON: It's an allegation that we're
19 making on information and belief that he --

20 THE COURT: I understand it's an allegation
21 you're making on information and belief. I find it less
22 than plausible. So in order to make a plausible
23 allegation like that, I have to have some rigor detail,
24 something. You know, on information and belief isn't I'm
25 looking in the air plucking it out like that and saying we

1 are making that allegation. What's the information?
2 What's the belief?

3 MS. THOMPSON: The information is that he could
4 -- and it is based on our view of the evidence that we
5 have so far about this case. This is not something that
6 he necessarily came up with himself, but that he conferred
7 with others because he needed --

8 THE COURT: Who?

9 MS. THOMPSON: Unknown defendants. We don't
10 know.

11 THE COURT: How do you know he conferred with
12 others?

13 MS. THOMPSON: Because this is something that he
14 would have needed to have talked with other people about,
15 how to frame these results in a way that made them seem
16 plausible when fact he knew --

17 THE COURT: He conferred with others about the
18 best way to conceal?

19 MS. THOMPSON: Yes.

20 THE COURT: Who were the others that he
21 conferred with about the best way to conceal?

22 MS. THOMPSON: We don't know.

23 THE COURT: But you said that you have
24 information, not just information alone or belief alone,
25 information and belief. What is the information?

1 I mean, maybe I've been too general. Rule 11 means
2 something. This is a very serious allegation against
3 someone. There better be a basis for it. It's not enough
4 to say, well, we kind of pulled it together. We thought
5 as a matter of circumstantial evidence we can hang all
6 these guys together.

7 You made an allegation that they concealed
8 incriminating evidence and talked about it and you say you
9 did it on information, and I've asked now what the
10 information is and I haven't gotten an answer yet. Who is
11 your informant for this?

12 MS. THOMPSON: I want to be clear about what I'm
13 saying to the court so let me try to state this in a clear
14 way.

15 It is unusual in my experience to have a meeting
16 between detectives and -- or a meeting between the
17 prosecuting agency, as the court said, the people involved
18 in prosecuting a case, and the scientific analyst before
19 their opinion comes back where by admission -- this is
20 what came out in the state court proceedings -- that the
21 state actors explained to these agents what it is that
22 they -- what was going on in this case and what was
23 happening. That does -- the court indicated that it's not
24 unusual for that but it is in my experience.

25 THE COURT: Well, I guess I can't introduce my

1 own experience here, can I? I cannot do that, but it
2 provides a background against which I evaluate the
3 plausibility of something.

4 So not to introduce it but just to provide a sense of
5 background. I've worked for four years as an assistant
6 U.S. attorney. I was the head of the state public
7 defender agency. I've been on the court for over 30
8 years. For more than 30 years I've observed these kinds
9 of cases. It is bad practice no question about it. The
10 bureau ought to be embarrassed, they were, by this kind of
11 faux science that we now know could be faux science, but
12 that's different from saying concealed incriminating
13 evidence.

14 That's sloppy -- well, more than sloppy. It's just
15 an unprofessional practice. On the other hand, qualified
16 immunity probably provides protection for sloppiness and
17 lack of professionalism, and so for me to analyze this
18 complaint in that context requires that I do something
19 more than look at on information.

20 I asked the question and it appears that it is on the
21 basis of your experience that this must have been
22 conversations about the best way to conceal incriminating
23 evidence; is that it?

24 MS. THOMPSON: The other important piece of
25 this, Your Honor, is --

1 THE COURT: Well, is that it?

2 MS. THOMPSON: That's not it. That's not the
3 only issue.

4 THE COURT: So apart from your perception of
5 your experience, what else is there?

6 MS. THOMPSON: We know that, we know that the
7 conclusions as reported -- and it's not about the
8 testimony, although the testimony repeats it. We know the
9 conclusions as reported are false. The question is why.

10 As the court has indicated, there is some analysis
11 that's done by the FBI's own audit about why it is that
12 these reported results were false and that audit does not
13 exculpate these defendants. It does not say we know with
14 certainty that these were good-faith mistakes. It just
15 says there's mistakes.

16 THE COURT: You understand what you have to
17 prove to get beyond immunity?

18 MS. THOMPSON: Understood. We have to prove
19 probably and we have alleged a knowing fabrication and
20 that's what we're saying happened.

21 THE COURT: Now I'm asking what's the known
22 fabrication? What do you know about known fabrication
23 that permits you to say that? Do you have someone who was
24 in a meeting and they said the evidence is really lousy
25 here. We've got to falsely create a report and we've got

1 to conceal other incriminating evidence?

2 MS. THOMPSON: Based on how wrong these results
3 are, we have made a good-faith allegation about what we
4 expect that the evidence can show. It's true that we need
5 discovery to prove up our claims.

6 THE COURT: See that's the conundrum of
7 discovery in the face of pleading objections. You don't
8 really get to come in and say I don't know but I think and
9 so I brought this lawsuit to find out. That's not the way
10 it goes.

11 You have to have a good-faith basis supported by
12 facts for making an allegation like this, and I'm
13 suggesting to you -- perhaps more gently as I said than
14 the circumstances suggest -- that this has some potential
15 Rule 11 problems, and you better be very certain about the
16 basis that you would rely on as good faith.

17 So far what I understand it to be is your experience
18 that what's probably likely under these circumstances that
19 in the circumstance of the prosecution team and experts
20 meeting and talking about what the thrust of their case is
21 that they would necessarily have discussed concealing
22 incriminating evidence. Now what's the incriminating
23 evidence that they were concealing?

24 MS. THOMPSON: I'm sorry?

25 THE COURT: What's the incriminating evidence

1 that they're concealing?

2 MS. THOMPSON: Well, it's exculpatory evidence
3 that they were --

4 THE COURT: It's what?

5 MS. THOMPSON: That these defendants were
6 concealing exculpatory evidence.

7 THE COURT: What is it?

8 MS. THOMPSON: That these hair results in fact
9 did not match Mr. Perrot. The other forensic --

10 THE COURT: Is that a product of faux science or
11 is it simply that they knew that one hair was a dog and
12 the other hair was Mr. Perrot's and they said they match?
13 Is that what you're saying? Or are you saying they had
14 one hair and it was something, they didn't know what, and
15 based on their belief and the science at the time they
16 said it is consistent with or is in fact Mr. Perrot's
17 hair? Is that the alternative?

18 You know, there are dog hair cases. Those get
19 outside of immunity when somebody knows that the specimen
20 that they're relying upon, an unknown specimen is in fact
21 something that could never in a million years be the hair
22 of a potential defendant, but I don't understand that
23 that's here yet. I haven't heard you say that that's
24 here.

25 What I've heard in response is they were

1 unprofessional in the sense of meeting with the
2 prosecution team and learning what the outcome or the
3 result of the prosecution team wanted and then conforming
4 to it. Lack of professionalism is probably negligence.
5 It doesn't strike me as an intentional tort in the sense
6 of constitutional torts.

7 You said that there's concealment or falsity; falsity
8 seems to tie right back into the question of junk science.
9 But, for instance, was Mr. Eubanks or Mr. Oakes writing
10 home saying I spend my day doing junk science? Is there
11 some confession like that? Some acknowledgement that this
12 is non-scientific? Or is it simply that you have done,
13 more or less what they've done, which is to take the facts
14 and try to meld them in to a way that supports the
15 proposition for which you contend without underlying
16 support for it?

17 So I have your idea of what is likely. Do I have any
18 writings by these individuals, or do you have any writings
19 by these individuals?

20 MS. THOMPSON: No, Your Honor.

21 THE COURT: Do you have any informant who says I
22 sat at a meeting and they said we're going to falsify this
23 evidence and we're going to conceal things that show
24 otherwise?

25 MS. THOMPSON: We don't have that, Your Honor.

1 THE COURT: Okay. That's a pleading problem
2 because I can't say that it plausibly asserts a claim
3 against which a motion to dismiss on the basis of immunity
4 would be resisted. And what are you going to do to deal
5 with that perception on my part?

6 MS. THOMPSON: Well, two things, Your Honor.
7 One is if the court doesn't view our pleadings as
8 sufficient, then we can replead and reallege it in a
9 better way.

10 THE COURT: Well, the question is can you? You
11 just told me that you don't have somebody who's giving you
12 inside information. You don't have documents and you're
13 relying on your perception of what likely happens under
14 circumstances like this whenever experts and adversary
15 parities get together to discuss how they're going to
16 present the case.

17 MS. THOMPSON: If a plaintiff in Mr. Perrot's
18 position had to at the outset --

19 THE COURT: Excuse me. Should I be pronouncing
20 it Perott rather than Perrot?

21 MS. THOMPSON: Our understanding is it's Perrot,
22 Your Honor.

23 THE COURT: Perrot.

24 MS. THOMPSON: If a person in plaintiff's
25 position in order to allege -- in order to file a

1 complaint about the situation that arose in this case had
2 to say I know somebody who was at the meeting, here's what
3 was said, somebody in Mr. Perrot's position would never
4 get to sue someone who's in these defendants' context.
5 Maybe the court believes that's appropriate, but that puts
6 a burden on Mr. Perrot that no one in his position is ever
7 going to be able to meet.

8 What he has here is --

9 THE COURT: That's not true. It happens all the
10 time. I get these information and belief pleadings all
11 the time and then I say all right. What is it? Now is
12 the time to tell us and I get somebody say, I knew the guy
13 who delivered the coffee and he was there and he heard it.
14 So that's not (A) as a practical matter in my experience
15 always the case but the burden is with you. The burden is
16 with you to show that there are facts upon which you can
17 reasonably rely to overcome the immunity defense that is
18 going to be raised as to this.

19 I have indicated before that there are issues with
20 respect to the pleadings that may be remediable. That's
21 what we're doing now. On this one I don't know if it's
22 remediable. What you are asking for that would be
23 remediable that could provide the foundation that could
24 ever come is the likely restated view or restated motion
25 to dismiss dealing just with the question of immunity for

1 these defendants. If I thought there was a prospect, I'd
2 certainly want to consider it fully but you hadn't told me
3 that's a prospect. Is there one?

4 MS. THOMPSON: I don't know how to state it at
5 this point any better than this. We know that we are
6 talking about false reports and the question is why.

7 THE COURT: When you say false, I just want to
8 be clear false means bad science. It doesn't mean that
9 the report said X and it was not X in some verifiable
10 form. That it said it was raining on Friday and it wasn't
11 raining on Friday.

12 This is simply -- I say simply, this is bad science,
13 not very good science. On the other hand, science that
14 was accepted in courts throughout this time period; that
15 the scientific community didn't really focus on
16 effectively for some time and these guys were practicing
17 this -- if it's not science, I guess it must be art but
18 not necessarily doing it in a way that was believed that
19 what they were doing was false, intentionally false.
20 Unless you got something more specific than that, that's
21 what I'm trying to get at.

22 MS. THOMPSON: We have pled this in the
23 alternative. One way that we've pled it is that these
24 defendants knew that these were not matches and reported
25 them as matches, that's one thing. The second I think

1 what the court's talking about --

2 THE COURT: But what do you have to say that
3 they knew it wasn't matching, a match? I said -- I used
4 the dog hair one because those are the most graphic
5 examples of this kind of thing and ones which I have some
6 familiarity with. Those are easy. You know, somebody
7 knows it's dog and they say it's human hair. That
8 happens, false, but that's not what you're saying here I
9 don't think.

10 As I listen to what you're saying is this was lousy
11 science. Nobody could get matches that anybody could call
12 science that you could say to a reasonable degree of
13 scientific certainty or follicle certainty this was the
14 same hair or even consistently the same hair.

15 Now we know or we think we know -- maybe the
16 defendants don't argue otherwise -- now we know this is
17 not good science. But the question for these claims,
18 which as I say is very inflammatory and in a way that the
19 court should not foster unless there's support as I say
20 under Rule 11. I don't know that you have that.

21 So I'm inviting you to tell me what you've got here.
22 Is there somebody who's in hiding in Idaho in a cave
23 afraid that the FBI will come after them, well, maybe I'll
24 think about you saying informant X but I don't think you
25 have that.

1 MS. THOMPSON: We don't have anyone in a cave in
2 Idaho. Again, Your Honor, it's our assertion that's not
3 what the pleading requirements require.

4 We have alleged -- and I understand the court
5 disagrees with me. I'm not trying to -- I understand what
6 the court's view of this is and the court knows what I
7 know at this point.

8 What we have allege is that these defendants
9 understood the limitations of the science that they were
10 proceeding under. They understood even -- they
11 understood, number one, the limitations of the science
12 that reporting somebody as a match under the science in
13 this situation was overstating the evidence and that's not
14 a -- we're saying that's not an innocent mistake. We're
15 saying that's a knowing issue. That these defendants knew
16 that the science didn't support a conclusion that these
17 hair comparisons could be made with the other forensic
18 evidence.

19 THE COURT: Are you saying the science as it
20 existed then? I mean that goes to this question of their
21 knowing.

22 MS. THOMPSON: Right.

23 THE COURT: If they are United Believers backers
24 or earth centric universes, I suppose I would say that
25 they don't quite have the intent that is necessary.

1 MS. THOMPSON: I agree, United Believers are --

2 THE COURT: So what are you saying that this is
3 something other than people who worked in this lab at the
4 bureau who had developed some techniques that they thought
5 were useful that they knew it wasn't? That they knew it
6 didn't meet any kind of outside standard? That it was
7 then extant?

8 MS. THOMPSON: What the FBI -- and the court
9 obviously has familiarity with this. What the FBI's audit
10 concluded was not that the methodology -- it's not just
11 about methodology. It's about the way that the certainty
12 and sort of the -- it's the way that the certainty of the
13 comparison is being testified to and reported about.

14 So it's not even the methodology of hair comparison.
15 It's understanding does the fact that there are certain
16 similarities between certain hairs mean that these hairs
17 are the same to the exclusion of all others? Can you look
18 at two hairs that are similar and say these two are
19 similar, therefore, we know they came from the same person
20 or do --

21 THE COURT: Why isn't that just sub-competent?
22 I'm looking at this and I have some -- well, I shouldn't
23 say I have some familiarity, but we've had cases of false
24 drug reports, all of the state district attorneys' cases
25 involving drugs and a new wave of them is present out here

1 in Western Massachusetts.

2 Those are people posing to be scientists who didn't
3 do anything or they made stuff up. That's different from
4 somebody who thinks they knew what they're doing and
5 whatever they're doing is not science, and that
6 distinction probably plots pretty well along the lines of
7 between immunity and lack of immunity.

8 So I look at this and say, is there any way on God's
9 green earth that this thing can make it past the immunity
10 claim? It doesn't now. I want you to understand that it
11 is not plausible now. It's not plausible in part because
12 of the severity of the claims made with respect to these
13 two individuals.

14 In order to make them plausible in this larger
15 context, I need something that shows me that they weren't
16 sub-competent; that they knew what they were doing was
17 just plain wrong, and I don't hear anything that you've
18 said that tells me that you have that.

19 Now let me go back to where I started before. What's
20 your Federal Tort Claims Act? What have you teed up your
21 Federal Court Claim Act?

22 MS. THOMPSON: We've teed it up in the same way.
23 I understand the court's question about whether there's
24 some sort of negligence claim that we could potentially
25 pursue. That's not -- what we intend to allege is the

1 same thing. We believe this is not a case about a
2 mistake. This is a case about people participating in a
3 conspiracy to frame Mr. Perrot.

4 THE COURT: So I'm not in the business of
5 advising how to draft a complaint, but I mean you're going
6 to neglect negligence?

7 MS. THOMPSON: Honestly that's not where we've
8 -- that's not where we believe this case is at, but I hear
9 what the court is saying.

10 THE COURT: Well, it's up to you. Let me just
11 say that I will do with this what I have done with the
12 previous ones, which is to say I'll deny the motion to
13 dismiss without prejudice to it being raised again upon
14 the First Amended complaint with this adjuration that this
15 is a bit more than simply filling in the dots.

16 This is something that I view as raising serious
17 issues under Rule 11 and you'll evaluate your pleading in
18 that context. I'm not sure there's more I need to say.
19 I'm going to let you develop your case in your pleadings.

20 There is no question that this is a horrific set of
21 circumstances. The larger question is, are any of the
22 defendants you allege here responsible in some way that
23 the court's going to identify?

24 The claim is alleged in an incendiary fashion and I'm
25 not sure that there's even smoke to support that kind of

1 fire with this kind of a claim.

2 So I made the government sit down while I asked some
3 questions. You've kind of heard the bottom line; perhaps
4 you want to argue the bottom line right now, but I think
5 that's where I am on this.

6 You can let me -- if I have to, I'll define the
7 larger principles of Bivens but I don't think I have to
8 and I don't think I want to because I think it is an area
9 that is simply too over-textured right now. Go ahead.

10 MR. GREENE: I represent the U.S. Department of
11 Justice representing Special Agents Eubanks and Oakes.

12 As the court is familiar, the court instructed that
13 the district courts have to first determine whether or not
14 there is a Bivens before proceeding and as we have argued
15 in our motion the way that analysis is done there should
16 be no Bivens.

17 THE COURT: All right. My view of it this, on
18 that issue is to say that if there is in this uncertainty
19 context of reaching Bivens, if there's no clearly
20 available alternative grounds and that's the basically
21 pleadings ground, we reach that first without going to
22 offer scenarios of Bivens so that's really what I'm doing
23 here.

24 MR. GREENE: Understood. We'd also argue that
25 under qualified immunity defendants have a right to have

1 that determined before discovery commences so is the court
2 denying defendants' motion for qualified immunity?

3 THE COURT: You said that -- I think my view on
4 it is that I don't see a need for any further -- any
5 discovery. You've got a motion to stay the discovery in
6 place right now. I don't see any further discovery here.
7 There was a full hearing with respect to this in state
8 court where this evidence could be developed by that
9 plaintiff, isn't that protecting you?

10 MR. GREENE: Just to be clear, you are granting
11 the motion to stay discovery?

12 THE COURT: I'll want to hear anything further
13 that counsel has to say on this, but it's very hard when
14 you don't know everything to plead and so you should start
15 the lawsuit to get discovery to find out whether or not
16 you got a good lawsuit, that doesn't do it.

17 Is there something more you want to say? You did
18 have a full extensive hearing in the state court before
19 Judge King?

20 MS. THOMPSON: The only thing I'll say is the
21 purpose of that hearing was not to decide if anybody was
22 liable. That goes to the whole --

23 THE COURT: It may not be but it certainly was
24 to decide whether or not there's a basis to get a new
25 trial because there was lousy science presented to the

1 state court.

2 MS. THOMPSON: The only issue there was, was the
3 science lousy. It wasn't --

4 THE COURT: The issue to be fully developed
5 there was whether or not there were grounds as a result of
6 the testimony and certain reports by the federal bureau
7 agents so I can't see it here. It wasn't brought up.

8 I don't see a need for further discovery particularly
9 in light of the alternative or competing consideration of
10 not eviscerating or eroding the concept of qualified
11 immunity by saying you've got qualified immunity for this
12 so just bring a lawsuit, then we get to conduct discovery
13 for awhile unless there's some more specifics.

14 MS. THOMPSON: We're asking for discovery but I
15 understand that we need to approach the court through a
16 better pleading that we deserve it first and that's what
17 we will do.

18 THE COURT: Okay. That's where we are on that.
19 That is to say, with respect to the motion to stay
20 discovery, which is number 89, I will allow that.

21 With respect to the motion to dismiss number 71 for
22 failure to state a claim on behalf of the Agents Eubanks
23 and Oakes, I'm denying that without prejudice to its being
24 reasserted when the first amended complaint gets filed the
25 1st of February.

1 MS. THOMPSON: The only thing I would ask, Your
2 Honor, there obviously is discovery from Eubanks and
3 Oakes that relates to our claims against the Springfield
4 defendants, so it's discovery that we believe we're
5 entitled to whether or not these defendants remain
6 defendants.

7 THE COURT: That may be so, but you don't need
8 it with respect to your claims. You don't really need it
9 with respect to these defendants either. Either you have
10 the other defendants, the non-federal defendants, you
11 either have it or you don't.

12 MS. THOMPSON: I'm saying Oakes, for instance,
13 was in this meeting with these defendants talking about or
14 these defendants made representations to him about the
15 case so obviously that's something we need at some point
16 in this litigation.

17 THE COURT: You may. The government will have
18 to consider that in Touhy in writing. That's their
19 constraints upon the testimony that the agents can give
20 and there's a form for doing that. I don't mean to
21 stretch that by the method that I'm affording you to
22 assure that you've got a complaint that is as good as it
23 can be at the outset.

24 MS. THOMPSON: I just want to make sure that we
25 can pursue what we believe we're entitled to whether or

1 not they're defendants without running a fowl of the
2 court's stay order.

3 THE COURT: Well, yes, although I don't think
4 that you're going to get deposition testimony from either
5 of one them in the next 90 days.

6 MS. THOMPSON: I think it's more a documentary
7 issue.

8 THE COURT: What are the documents?

9 MS. THOMPSON: We don't know what --

10 THE COURT: Wait a minute. What documents?

11 MS. THOMPSON: They may have records relating to
12 these meetings, relating to their communication of these
13 defendants.

14 THE COURT: They probably have to turn them over
15 in time, something like that over sometime. So what's the
16 response, just dig in?

17 MR. GREENE: Your Honor, we believe that the
18 defendants are protected from discovery until their
19 qualified immunity issue is resolved.

20 THE COURT: They may be, but if they're out of
21 the case and nevertheless there's a record concerning
22 efforts to get discovery, once you jump through Touhy.

23 MR. GREENE: Sure. I'm certainly not suggesting
24 that if the FBI were to get a third-party subpoena or some
25 other request for documents, that the FBI wouldn't comply

1 with it if I believe that's what counsel is suggesting.

2 THE COURT: That's what I'm suggesting, which is
3 that I will permit her to do third-party subpoenas in this
4 interim period to get whatever documents.

5 MS. THOMPSON: Thank you, Your Honor.

6 THE COURT: That's the limitation; that the stay
7 is except as to providing third-party subpoenas or I
8 should say *subpoena ducus tecum* in documents related to
9 specific meetings.

10 MS. THOMPSON: Understood.

11 THE COURT: Okay. Now I anticipate that we will
12 all get to think deeply about the pleadings after February
13 1st here but I need to move this case along as best I can.

14 My view is that civilians in Springfield are entitled
15 to come to Springfield. That the other parties will show
16 up in Boston and may even have ticklers that show Boston
17 and not Springfield here.

18 If there are practical issues, you tell me. I'll try
19 to deal with that, but as far as I'm concerned this is a
20 case I'm going to keep and deal with it in a fashion that
21 causes the least amount of disruption to the entire
22 system, including the assignment of judges in this
23 district.

24 Are there any other matters that I should be thinking
25 about here or you'd like some direction on?

1 Okay. So February 1st is what I really look forward
2 to. I also look forward to getting a copy of whatever it
3 was that you were alluding to in paragraphs 125.

4 MS. THOMPSON: We will provide that promptly,
5 Your Honor.

6 THE COURT: Anything else? All right.

7 THE CLERK: All rise.

8 **(Hearing concluded at 11:07.)**

9 -----

10 CERTIFICATION

11
12 I certify that the foregoing is a correct
13 transcript of the record of proceedings in the
14 above-entitled matter to the best of my skill and ability.

15
16
17
18 /s/ Alice Moran

December 21, 2018

19 Alice Moran, RMR, RPR

20 Federal Official Court Reporter
21
22
23
24
25